An Independent Study of Submerged Lands Leasing and Regulatory Issues Affecting Wind Power Development in Maine's Coastal Waters

Prepared for the Maine State Planning Office

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I. Context and Purpose of This Study

Right now, wind power promises the clearest path for Maine's energy future.[1] By comparison to other energy fuels, wind resources are inherently free, limitless, reliable, efficient, renewable, indigenous and clean. Maine's wind power opportunities are greatest offshore of its coast, on lands owned in trust by the State.

Both state and federal governments have progressively embraced policies to provide incentives and minimize hurdles to wind power development. A few highlights:

* Following recommendations of Governor Baldacci's Task Force on Wind Power Development in February 2008, the Legislature reformed Maine's regulatory laws to encourage wind energy development in most upland areas of the State, including all areas within municipalities.[2] As recommended by the Wind Power Task Force, the new law set these State goals: at least 2000 megawatts of installed wind power capacity by 2015; and at least 3000 megawatts by 2020 with at least ten percent to be built offshore.[3] The Task Force's report further recommended that Maine's environmental laws be streamlined and its submerged lands leasing policies be updated to better accommodate offshore wind energy projects.

* In November 2008, Governor Baldacci established the Ocean Energy Task Force to develop a strategy aimed at meeting or exceeding these goals for ocean-based wind energy. The Governor directed the Task Force to identify and recommend solutions to overcome obstacles to development of grid-scale wind energy generation in Maine's coastal waters.[4]

* Following recommendations of the Ocean Energy Task Force in its interim report in April of this year,[5] the Legislature enacted additional reforms to create a streamlined regulatory and leasing process for wind power demonstration projects in selected areas of Maine's coastal waters.[6] The Task Force plans to issue its final recommendations later in 2009, with the objective of identifying legislation and other reforms needed to improve the State's leasing and regulatory processes for ocean energy development.

* At the national level, Congress enacted the Energy Policy Act of 2005 to authorize the Department of Interior to grant leases and other proprietary rights on the Outer Continental Shelf for wind power and other alternative energy development.[7] In April of 2009, the Department's Minerals Management Service issued comprehensive regulations to carry out this mandate, including in establishing methods for computing lease rent and other

[1] "Wind power is broadly recognized to be the most significant, economically viable, utility-scale renewable source of electricity currently available, which helps explain why it is the fastest growing power source in the world." *Final Report of the Governor's Task Force on Wind Power Development*, February 2008, p. 5.
[2] P.L. 2007, c. 661.
[3] *id.*, c. 661, sec. A-6; 35-A M.R.S.A §3404(2).
[4] Executive Order Establishing the Ocean Energy Task Force, November 7, 2008.
[5] *Interim Report*, Ocean Energy Task Force, April 15, 2009.
[6] P.L. 2009 c. 270.
[7] Sec. 388 of the Energy Policy Act of 2005, Public Law 109-58.

compensation, revenue sharing of this income with states, and integration of leasing with federal regulatory review and permitting.[8]

* A few states have established highly individualized programs to plan for and attract offshore wind energy development, with the payoff being access by these states on favorable terms to new alternative energy supplies. For example, Rhode Island has undertaken an elaborate planning process designed to aggressively pursue offshore wind power development (mostly in federal waters) in partnership with a selected developer. Massachusetts is completing a broad-based planning effort leading to the siting of wind power development in selected areas of that state's coastal waters. Delaware has entered into a power purchase agreement with a major offshore wind power developer. New Jersey requires its utilities to purchase renewable power, has created a system of renewable energy credits weighted in favor of offshore wind power, and is paying the cost of meteorological towers for developers pursuing these projects. As the top wind power producing state in the nation, Texas is the first jurisdiction to undertake competitive bidding for leases of its coastal waters for wind turbines. Each of these states is developing unique entrepreneurial approaches reflective of their significant political, economic and cultural differences.

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Maine's current legal and policy framework for wind power projects in state coastal waters involves an interface among different laws, agencies, policies and programs. Leasing decisions are made by the Bureau of Parks and Lands in the Department of Conservation (DOC), while regulatory permitting is the primary responsibility of the Department of Environmental Protection (DEP), with uncertain involvement of the Land Use Regulation Commission (LURC) as well as of some coastal municipalities.

On the whole, Maine is where it should be in making serious strides to consider and respond to issues presented by the onset of wind power development in the State. The earlier work of the Governor's Wind Power Task Force and the current work of the Ocean Energy Task Force, as well as the Legislature's enactment of a host of legal reforms so far, manifest the scope and vigor of these efforts. That said, as described in this report, in a number of ways government roles and programs would benefit from greater clarification, certainty and harmony. The Ocean Energy Task Force has the ideal opportunity to articulate and call for the changes that are needed.

To assist the work of the Task Force, this study independently evaluates issues and suggests ideas intended to increase effectiveness and efficiency among agency programs while optimizing public benefits from developing this new energy resource. In making concrete proposals in response to the issues evaluated, this study is intended to stimulate thinking among policy-makers more than to advocate for particular outcomes, which will be for the Task Force, the Governor and the Legislature to determine.

[8] Final Rule, Minerals Management Service, U.S. Dept. of Interior, Renewable Energy and Alternative Uses of Existing Facilities on the Outer Continental Shelf, 30 CFR Parts 250, 285 and 290, April 2009.

II. Study Methodology

In pursuing this project, I have worked and communicated closely with Todd Burrowes at the State Planning Office, who is familiar with the issues involved and has provided thoughtful direction and insight throughout. My research has included examining and evaluating relevant Maine laws and procedures, reviewing extensive laws, regulations and program descriptions of a number of other coastal states and the U.S. Department of Interior (including its recently issued regulations on submerged lands leasing for alternative energy projects), undertaking other online research, and conducting meetings or telephone interviews with over 30 public policy experts from Maine (including representatives of all of the agencies affected) and six other states. From these sources,[9] extensive written materials have been assembled and memoranda produced, which have been used in preparing this report. Although the work invested in this study was considerable, it cannot be viewed as exhaustive and was of course limited by practical constraints of time and budget.

While numerous elements of this project have drawn upon my legal background and knowledge of the State programs involved, this work should be viewed as a policy study rather than a legal analysis. Informed by my research and background, the purpose here is to evaluate issues and suggest policy options from an independent perspective. Although informed and influenced by the many views shared with me by others, I am of course responsible for the ideas selected and the analysis offered below.

[9] Research, interviews, meetings, communications and relevant web sites are described on the appended list of source materials.

III. Implications of the Public Trust Doctrine

In considering options for utilization of Maine's coastal waters for wind power development, one must start with the important underlying principle that these lands and waters are held by the State, not as an absolute proprietor, but in a fiduciary capacity as trustee for the benefit of Maine people.[10] The public trust under which these lands are held imposes important restraints on their disposition to and use by private parties, and so must inform government decisions and processes in this regard.

Deriving from English common law, the public trust doctrine was energized in America in the leading U.S. Supreme Court decision of *Illinois Central R. Co. v. Illinois*.[11] Holding that the state was incapable of unconditional alienation of public trust resources (in that case submerged lands in Lake Michigan), the Court opined:

> The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and the soils under them, so as to leave them entirely under the use and control of private parties, … than it can abdicate its police powers in the administration of government and the preservation of the peace.[12]

The public trust doctrine historically evolved to protect public uses of tidal waters and submerged lands for navigation, fishing, and related commerce. Over time, courts have come to recognize additional public trust resources and values, and have accorded reasonable discretion to well-articulated acts of the legislative branch in fashioning public trust purposes and authorizing utilization and development of these lands under continuing government supervision when in furtherance of these purposes. Thus, over the years Congress has enacted laws to enable certain types of private uses of federally controlled waters when in the national interest: for example, the Outer Continental Shelf Lands Act, which permits offshore oil and gas development; the Federal Power Act, which regulates hydroelectric facilities; and, importantly to this discussion, the Energy Policy Act of 2005, which authorizes leases for wind power and other renewable energy generating facilities in federal coastal waters.

In a challenge of an offshore wind power facility under the public trust doctrine, environmental groups alleged that the project was responsible for killing large numbers of birds. In its decision, the California appellate court found wildlife resources to be worthy of public trust protection and the plaintiffs to have the requisite standing to challenge the government's decisions under the public trust doctrine.[13] However, recognizing that protection of public trust resources requires informed balancing of competing public interests, the court showed substantial deference to the policy-making branches of government in fashioning needed protections for bird populations:

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[10] This discussion does not purport to offer legal opinions or conclusions but provides a basic, necessary framework for consideration of the policy issues and options to follow.
[11] 146 U.S. 387 (1892).
[12] id at 453
[13] *Center for Biological Diversity, Inc. v. FPL Group, Inc.*, 166 Cal.App.4th 1349 (2008).

> … [Traditional public trust uses] are not the only interests that must be considered. A delicate balancing of the conflicting demands for energy and for the protection of other environmental values must be made. The public trust permits – even requires – the balancing of competing uses.[14]

Thus, as with many public trust cases emanating from *Illinois Central*, the court's customary focus is not on making its own determinations about weighing the costs and benefits of public trust resource allocation issues, but in assuring itself that the legislative and executive branches of government have done so with due regard to their fiduciary responsibilities:

> [I]t is apparent that we are still on the upward slope of the learning curve in generating energy by the use of wind power. Intervention by the courts, other than by exercising oversight over the administrative process and ensuring that proper standards are applied, not only would threaten duplication of effort and inconsistency of results, but would require the courts to perform an ongoing regulatory role as technology evolves and conditions change.[15]

To the same effect, the Maine Law Court has sought to assure that the Legislature has undertaken its trust responsibilities in making dispositions of public trust resources, but has generally deferred to determinations that display careful legislative balancing of how the public interest in such resources is best served: "In dealing with public trust properties, the standard of reasonableness must change as the needs of society change."[16]

Mindful of these principles, in considering the need to accommodate a new type of fisheries management requiring private utilization of portions of the State's coastal waters, the Legislature vested in the Department of Marine Resources the power to lease and regulate the State's coastal waters for aquaculture.[17] Under this statute, the Department is obligated to carefully weigh the impacts of a proposed project on public trust values, such as fishing, navigation, marine habitats and other public resources that may be affected. In an early legal challenge of an aquaculture leasing decision, the Law Court upheld the application of this state law as embracing public trust considerations without giving weight to the interests and property values of private upland owners.[18]

Likewise, under the statute authorizing leases of Maine's submerged lands for non-aquaculture uses, the Bureau of Parks and Lands within the Department of Conservation must consider public trust-related uses and resources of the areas affected while setting fair compensation for the private use of public resources.[19]

How then can or should Maine, acting in pursuance of the public trust doctrine, proceed to carry out its fiduciary duties regarding the prospect of wind power development in State

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[14] id
[15] id
[16] *Opinion of the Justices*, 437 A.2d 597 (Me. 1981). See also *Opinion of the Justices*, 308 A.2d 253 (1973); *Cushing v. State*, 434 A.2d 486 (1981).
[17] 12 M.R.S.A. §6071-A et seq.
[18] *Harding v. Commissioner*, 510 A.2d 533 (Me. 1986).
[19] 12 M.R.S.A. §1861 et seq.

coastal waters? As manifest in the laws and cases illustrated above, the public trust doctrine in its modern construction both imposes restraints and provides opportunities. While the State has the obligation to reasonably protect public navigation, fishing, marine habitats, and other public and natural values, it may act to enable government-supervised, private utilization of these resources for the public good and in a manner that provides fair compensation to the public.

Although Maine law does not presently include wind power as one of the recognized public trust uses of the State's coastal waters and submerged lands, as discussed below the Legislature may exercise its judgment to do so by making requisite findings of public needs and benefits of alternative energy production for which Maine's coastal waters provide unique opportunities. Under appropriate legislative authorization, leases and other conveyances enabling wind power development should be based on adequate consideration of trust-related uses and values, mitigation of harms to those uses and values, appropriate restoration of the lands affected, and adequate compensation to the public for the use of its trust resources. All of these factors underlie the framing of issues and options discussed below.

IV. State Leasing Issues

1. State decision-making structure; one-stop authorization

Issue Statement:

Significant development projects in Maine's coastal waters require legally independent decisions by two State agencies: a submerged lands lease issued by the Department of Conservation (Bureau of Parks and Lands); and regulatory permits issued by the Department of Environmental Protection. In the past, this system has appeared to function reasonably well in dealing with piers and other traditional projects involving utilization of submerged lands. The two-part scheme has been facilitated through a coordinated application and review process by which DOC, while making its own leasing decisions, routes projects requiring regulatory permits to DEP and generally relies upon DEP's pertinent findings and conclusions. Under recently enacted legislation recommended by the Ocean Energy Task Force to facilitate wind power demonstration projects in coastal waters, DOC's lease decision-making role has been circumscribed in favor of getting these trial projects underway at minimal cost and effort.[20]

Even though the two processes appear to be well-coordinated, they have been legally assigned to separate agencies because the lease decision-making role occupies a different legal and governmental function than the regulatory one. The former is principally directed at considering public trust criteria in determining the public interest in connection with the State's permitted utilization of its own lands, together with setting rent and other lease terms; while the latter is directed at more legally constrained, regulatory determinations relating to what is environmentally permissible on land typically owned by private parties.

There has been discussion of the idea of making these two processes (leasing and regulatory) subject to only one agency's determination, as substantially occurs for aquaculture leases issued by Department of Marine Resources. If 'one stop' decision-making of this type were employed for wind power projects in Maine's coastal waters, it would be important that the designated agency be prepared to make decisions that in the past have not been within its traditional framework or mind set (i.e., DEP undertaking proprietary, public trust decisions and negotiating rent and lease terms; or DOC undertaking regulatory review of environmental impacts). Even if these decisions are to remain bifurcated, a second question is whether the agencies involved possess the needed resources and expertise to do their jobs for purposes of major wind power projects.

Options:

Other states have developed a wide range of approaches to these issues, including one or more of the following: (i) vesting decisions in two completely independent agencies; (ii) providing for formal coordination of application procedures between the two agencies; (iii) one agency's deferring to the relevant decisions or findings of the other; (iv) operating under one

[20] For qualifying wind power demonstration projects receiving a DEP general permit, DOC is required to waive leasing review procedures and standards and issue a submerged lands lease consistent with the terms of the permit. P.L. 2009 c. 270, sec. B-1.

agency umbrella with two sub-agency decision-makers; and (v) complete or partial one-stop decision-making by a single agency.[21] While Maine's aquaculture leasing law furnishes an illustration of a decision-making process in which virtually all regulatory and proprietary decisions are vested in one agency, aquaculture might be viewed as atypical because the subject matter is within the sole expertise of the one-stop agency (the Department of Marine Resources), involves a traditional use of the State's coastal waters (fishing), and poses potentially fewer conflicts and is less intrusive than a major wind power facility.

Proposal:

As illustrated by the State's aquaculture leasing program, there are obvious benefits to the integration of public leasing and regulatory decision-making into one agency. However, the scale of development involved in a major wind power facility and its attendant panoply of regulatory and leasing issues and perspectives suggest that, in the context of Maine's culture, the problems may outweigh the benefits of merging these inherently different (and potentially competitive) functions in one agency. From discussions with representatives of each agency, neither DEP nor DOC may be prepared to fully take charge of both of these roles. Further, there may be a perceived conflict of interest if the leasing agency is also responsible for regulatory permitting, at least in cases where substantial financial and other benefits to the State are at issue.

Moreover, provided that the work of the two agencies is optimally integrated, a two-agency process need not result in delays, lack of predictability or duplication of effort. In order to assure that this be the case, DOC's lease decision-making might be appropriately required (rather than simply empowered, as currently the case) to adopt pertinent fact-finding from DEP's regulatory decisions.

Assuming the decision-making scheme remains in two agencies as suggested here, it is useful to consider a refinement in which DOC assigns at least some aspects of the lease negotiation and compensation process to another agency having expertise with the types of complex, energy-related issues, laws and lease terms involved with a major wind power facility. For that purpose, an agency with highly relevant expertise would be Maine's Office of Public Advocate.

2. Rent, fees and other forms of compensation to the public

Issue Statement:

As described above, private utilization of Maine's coastal waters, which are held by the State as a public trust for fishing, navigation and other public uses, generally requires a proprietary grant (either lease or easement) from the Department of Conservation. Pursuant to its enabling statute and regulations, DOC (like its counterparts in other coastal states) typically assesses charges for exclusive, private uses of the State's submerged lands, although it has not

[21] Maine's current decision-making system includes elements (i), (ii) and (iii) above. By contrast, Rhode Island, exemplifying perhaps the ultimate in one-stop decision-making, combines in a single agency oversight of all major research, planning, site selection, review, regulation, lease and permit functions related to offshore wind power facilities.

yet devised a method of setting these specifically for wind power projects in State coastal waters. The challenge is to provide a commercially reasonable system that avoids creating a barrier to publicly desirable projects, yet meaningfully compensates the public for the use of its resources, mitigates for harms or dislocations caused by a development, and assures meaningful and sustainable public benefits.

Options:

Many approaches to lease compensation issues are taken by other jurisdictions. Rhode Island has determined that offshore wind power is so essential to its energy needs that little consideration is given to lease compensation beyond reimbursement of the State's out-of-pocket expenses.[22] By contrast, Texas views wind power development as a welcome generator of both energy and income, akin to its leasing public lands for oil and gas production. Texas already has considerable experience (and generates considerable revenue) from leasing its lands for wind power, and has recently entered into leases for offshore projects.[23] The federal government takes a balanced approach in its 2009 regulations, weighing considerations of both public benefits of alternative energy production and fair compensation for utilization of public resources (albeit at rates considerably lower than for oil and gas leasing). In some European countries, the equation is tilted all the way in favor of unilateral, heavy public subsidization of offshore wind power development.

Those interviewed in Maine on this topic expressed opinions similarly ranging from charging nothing at all for use of the State's coastal waters for wind power production to driving the hardest bargain in achieving economic benefits to the State. While each approach has its pros and cons, one should bear in mind that no American jurisdiction has much experience in this area (Texas having the most, but limited to a handful of coastal wind power leases, none of which has yet reached commercial production). Therefore, the nation is still in what might be seen as experimental stages of policy development on these among other related issues.

In selecting its own path, Maine might first consider the principle, expressly underlying the federal program, that private, profit-making utilization of public trust lands, which will inevitably result in some loss to human and environmental values and uses, should not go without fair compensation to the public. In addition, one should bear in mind that failure to require meaningful compensation could skew the marketplace so as to artificially induce commercial wind power to locate in State waters that might more appropriately occur in federal waters or upland areas, both of which require payment of compensation to the landowner. On the other hand, we know that lease compensation schemes will fail to produce *any* public benefits if they are so onerous or unpredictable as to deter otherwise desirable projects from proceeding. With these principles in mind, there follows an evaluation of a number of different approaches to

[22] These reimbursable expenses may be larger than one might expect. While reporting little interest in lease revenue as such, Rhode Island intends to recover from its selected developer the costs of public planning and site selection work, amounting to an expected $6 million.

[23] Texas reports that income expected from competitively bid leases issued in 2007 for offshore wind projects to range from $258 to $433 million over a 30-year term. "The Texas Wind Rush is on, and the pioneers are staking their claims," proclaimed its Land Office Commissioner. Press Release, Texas General Land Office, October 2, 2007.

the lease compensation issue (many of which can be applied cumulatively in selecting the best course for Maine).

a. Lease application fees.

Most states impose modest administrative fees for processing submerged lands lease applications. The purpose of these fees is to underwrite the costs of the leasing program. Since commercial offshore wind power facilities may be of an unprecedented scale and complexity for Maine's coastal waters, it seems reasonable to charge application fees at a level commensurate with the work and expense required to manage the leasing process.

b. Rent during testing phases for wind power projects.

The federal government's new regulations allow for short term leases for early non-commercial testing of offshore wind power facilities, with relatively low rents charged based upon the size of area encompassed by the lease. The federal rules also allow for initial non-production phases of long-term commercial leases to be assessed similarly low, base rents. Texas' wind power leases combine testing and commercial phases, with rent prior to commercial power production likewise charged at a relatively low rate. Even as commercial generation begins, Texas uses a tiered approach by which rent increases over time as the project reaches a sustained and proven capacity and initial development costs are paid off.

c. Royalty rent during commercial power production phases.

Most public lands leases for wind power development impose the bulk of rent as a royalty based upon the actual or imputed economic value of the energy produced. The federal formula is based upon a fraction (typically 2%, but this may be adjusted up or down) of imputed income, applied in a formula multiplying the installed capacity, reduced by an operating capacity factor, times the published wholesale rate for electricity in the region. In devising these regulations, the Department of Interior's Minerals Management Service specifically rejected a formula based on actual project income in favor of a capacity-based scheme that cannot be manipulated or challenged ("a formula related to the anticipated, rather than actual, gross value of the electricity generated").[24]

By contrast, Texas prefers a formula that includes (i) a minimum royalty based upon installed generating capacity and (ii) a production royalty based upon gross revenues, with the amount of both royalties escalating over time. The Texas official in charge of the program states that his agency, apparently unlike the federal government, is confident in its ability to audit a developer's books to determine the accuracy of reported revenues and income. In its leases, Texas also reserves the right to receive its royalty 'in kind', subject to provisions that protect prior contracts entered into by the developer after notice to the state.

[24] "In the interest of avoiding excessive complexity, MMS has chosen a straightforward and transparent fee mechanism." Minerals Management Service, U.S. Department of Interior, Response to Comments.

d. Fixed rent.

Texas and the federal government both require, in addition to variable royalty rent based upon income or imputed income, a more modest base of fixed rent, often dependent upon the size of the tract occupied by the project.[25] The idea of fixed rent, whether by itself or in combination with annual royalties based on capacity, is to assure the government some minimum return when the project is not operational, in order to compensate for the opportunity costs foregone by granting exclusive rights under the lease and to encourage full and expeditious utilization of the project site. The downside of too large a component of fixed rent is, of course, that it can render a project uneconomic when operations are occurring at less than full capacity or a time of depressed prices.

For leases of its submerged lands, Maine currently assesses relatively modest, fixed rents for a discrete set of projects, but also often uses rent formulae dependent on municipally assessed values of upland associated with the project, as discussed below. Under Maine's aquaculture laws, annual rent is fixed at $100 an acre.

e. Rent based on assessed or appraised value.

Many submerged lands leasing programs, including Maine's, compute rent for numerous projects based on a fraction of the tax-assessed value of upland associated with the submerged land under lease.[26] This system does not work for uses that are not associated with adjoining upland, as is typically the case for offshore wind power generating facilities. In these cases, some state programs, including Maine's, generally reserve the right to employ independent appraisers to assist in the establishment of rent.[27] Such appraisals may be based at least in part upon comparable upland used for similar purposes. However, the displacement of traditional public uses of submerged lands under lease to a major wind power developer may not be sufficiently measured by this appraisal scheme. The appraised value method also results in a rental computation that might not have a sufficient nexus to actual income generation or capacity at the site.

Perhaps for these reasons, assessed and appraised valuations are not used by Texas or the federal government in considering leases for wind power projects in coastal waters.

f. Competitive bidding.

Of course, if there is competition among wind power developers for prime areas, in a bidding process not all factors related to rent can be set by a fixed formulation. The new federal regulations establish procedures whereby the government publishes offshore areas that are open for leasing or enables private parties to propose such areas. If there is interest by more than one qualifying party, the government will establish with adequate public notice a lease competition in

[25] In prior sales, Texas has set a minimum annual fee at $20,000 annually per lease tract, which is about 20,000 acres. The federal regulations set a minimum rent of $3 per acre, which is less than half the rate charged for oil and gas leases.
[26] 12 M.R.S.A. §862(2)(A)(1).
[27] id.

which some rental parameters are set and others are subject to bidding. One relatively straightforward approach is to set the royalty formula while allowing competitive bidding to focus on the amount of fixed rent (which in this case is called a 'premium'). Of course, in any competitive bidding scheme involving use of public lands, all bidders must first qualify under tests of financial and other credentialing.

Using a less formalistic process than that adopted under the new federal regulations, Texas is the only American jurisdiction that has completed a competitive bidding process in awarding offshore wind power leases. That process is reactive, initiated by those interested in developing particular offshore tracts, which are then informally screened for appropriateness by relevant state agencies.

g. Purely ad hoc approaches to rent.

Maine has a new law, which by its terms does not apply to offshore renewable energy facilities, that enables DOC to establish rent for significant projects in purely ad hoc negotiations, taking into account the proposed use of the submerged lands, the diminution that may be caused to traditional public uses, the project's public benefits, and its economic value and avoided costs to the developer.[28] DOC's statute also contains provision, applicable to any submerged lands lease, enabling ad hoc negotiation of 'public compensation' for loss of traditional public uses caused by a project.[29] This latter approach to compensation is primarily geared toward generating money for public facilities that mitigate for the loss of public uses of leased lands. This statute also gives DOC the right to revalue rents in the future, an otherwise useful provision that may not work well for highly capitalized investments like wind power.

Other states like Massachusetts allow for broadly determined 'mitigation fees'. California gives exceptional discretion to its leasing agency to set rent based upon an array of general factors.

While these approaches may be helpful in providing flexibility in setting rent for non-traditional projects, the downside of that flexibility is that it can lead to unpredictability for prospective wind power developers, lack of direction for state administrators, and potential unevenness and unfairness in application.

h. Creative approaches tailored to energy generating facilities.

States like Rhode Island, New Jersey and Delaware are taking steps to aggressively pursue and incentivize offshore wind power development (often in federal waters, where the state would not be directly engaged in the leasing process). Each of these states is tailor-making the process to advance its particular objectives.

While Maine may choose to adopt its own variation of these far-reaching models designed to incentivize wind power development, for leasing purposes a creative approach might entail negotiating 'rent' in the form of energy supplied from the project to Maine's grid for use

[28] P.L. 2009 c. 316.
[29] 12 M.R.S.A. §1862(9).

by Maine consumers at an attractively fixed, long-term rate. Alternatively or in addition, Maine might negotiate for supply of State government's own energy needs at a significant discount. The benefit of such approaches is that they call upon the developer to pay most of its 'rent' in a share of kilowatts generated on-site rather than cash that may be in shorter supply, while the State receives the substantial benefit of energy for itself and/or its citizens at discounted rates. In addition to the financial and energy benefits of requiring rent to be paid in kilowatts, the State could boast that the electricity it uses comes from wind power generated in its own coastal waters. Note that Texas' lease provision (described above), by which it has the option to require royalties to be paid 'in kind', provides a simplistic way to implement this approach.

Another variation would be to establish, perhaps under enabling legislation, a two-tier system for rental determination: a lower overall rent for developers who agree that the power generated will be delivered to Maine consumers at negotiated rates, and a higher rental for unrestricted power sales.[30]

i. Uses of lease revenues.

Submerged lands being public trust resources of the State, income derived from their utilization should be spent in a manner having a relationship to trust purposes as determined by the Legislature (see the discussion in section III above concerning the public trust doctrine). Ordinarily, such purposes might include protection and enhancement of the public's coastal resources (for example, compensation for displaced fishing, enhancements to the State's marine resources management and research programs, environmental mitigation measures, coastal resource planning and management, underwriting submerged lands program costs, etc.). While consideration should be given to revenue uses that go beyond those currently envisioned by the State's submerged lands leasing program, the amounts that may be realized from wind power projects, while possibly considerable, will still require careful prioritization. The same types of revenue uses may also be appropriate for income Maine receives from the federal government's offshore alternative energy leasing program.

Under current law, proceeds of submerged lands leasing not spent on administrative costs are placed in a non-lapsing fund to support shore and harbor management improvement activities by providing grants to municipalities and funds to state agencies.[31] Lease proceeds for wind power projects that displace significant fisheries or fishing activity might be devoted in part to mitigating for these losses. Further, assuming the Legislature determines that the public trust purposes of these lands should embrace alternative energy development (see the discussion in section IV(3) below concerning water-dependent uses), some lease proceeds could logically be directed to public energy conservation, innovation and/or infrastructure investments. Finally, as discussed in section VI below, consideration should be given to a formula that allows a specific portion of wind power lease income to be shared with municipalities affected by these projects.

[30] Such differential approaches require careful legal analysis, including of any constitutional issues, which goes outside the scope of this policy study.
[31] 12 M.R.S.A. §1863.

Proposal:

The foregoing discussion of rent and other compensation issues and options suggests a number of reasonable approaches, one set of which is selected below for purposes of illustration. With appropriate legislative enablement, the chosen approaches should be specified in implementing regulations adopted by the Department of Conservation, the goal being to devise as clear an approach as possible to the determination of rent in order to provide reasonable predictability for prospective wind power developers in figuring their projected costs.

Under this illustration, lease application fees for major projects should be set at a level that pays the reasonable costs of agency review. Otherwise, these costs would be unfairly passed along to other fee-payers or the general fund. DOC should adopt a schedule of fees based upon its best estimate of such costs, and should be able to assess additional extraordinary costs only as necessary to represent the public interest in reviewing unusually complex projects.

Rent should include a relatively low, fixed component based upon the entire acreage encompassed by a project (not just the footprint of project structures set on submerged land), together with a formula for computing variable rent based upon either gross income (Texas model) or imputed income dependent upon generating capacity and wholesale prices (federal model). Variable rent should begin with commercial production and escalate in later years of the lease after start-up costs have been paid off (Texas model).

In lieu of a portion of rent paid in cash, the State should be able to negotiate for rent to be paid in kilowatts, either conveyed to the State outright or made available to Maine consumers at a discounted price. This approach could be broadly authorized by a law allowing differential rent structures depending on whether the electricity generated will go to Maine consumers.

Based upon a simplified version of the new federal rules, DOC should adopt fair and open procedures for notice and competitive bidding to be used when more than one qualified party might be interested in wind power development covering the same coastal waters.

Revenues to the State should accumulate in a trust fund and applied to some or all of the following purposes, according to priorities established by the Legislature:

- protection and enhancement of the public's coastal resources (for example, compensation for displaced fishing, enhancements to the State's marine resources management and research programs,[32] environmental mitigation measures, coastal resource planning and management, underwriting submerged lands program costs);

- energy conservation, innovation and/or infrastructure; and

- revenue sharing with affected municipalities (see discussion in section VI below).

[32] An illustration of this type of enhancement might be implementation of the "Data and Information Needs Assessment" found in Appendix P of the December 2006 "Bay Management Study."

3. Leasing criteria – water dependent uses

Issue Statement:

The laws and rules of the Department of Conservation (as with its counterparts in a number of other states) afford a preference to 'water-dependent uses' of the State's coastal waters, and by the same token impose an impediment to upland uses of these areas. This framework is an outgrowth of the public trust doctrine (described in section III above), by which submerged lands are held by the State in trust for certain public purposes. Absent a change in law, wind power development may not be readily embraced by the public trust doctrine in Maine and, under existing Maine rules, may not be considered a water-dependent use. While some states (like New Jersey) appear to be content to allow this restriction to essentially bar wind power projects in state coastal waters, others (like Massachusetts) have recognized this as an undesirable obstacle and are moving toward inclusion of wind power within the favored designation of 'water-dependent use' for submerged lands utilization.

Options:

By maintaining the status quo, Maine could opt to take New Jersey's course that restrains and perhaps forecloses commercial wind power development in its coastal waters. However, if the State wishes to enable this kind of utilization, it should amend its laws and rules to recognize wind power as a publicly valuable use of the State's coastal waters consistent with the public trust doctrine, and to designate wind power as a water dependent use.

Proposal:

This recommendation is relatively straightforward. If Maine wishes to actively pursue wind power development in its coastal waters, then amendments to its laws, rules and policies should be pursued along the lines described above. Taking this action will not guarantee wind power projects a green light in all of the State's waters, but will enable them to be considered on an equal footing with more traditional uses of these areas.

4. Lease duration

Issue Statement:

Since wind power generating facilities are highly capital-intensive, long term leases are necessary so that the developer (as well as its lenders) will have sufficiently secure tenure in the property to be able to invest substantial sums based upon a long payback period. On the other hand, because wind power is a relatively new and rapidly changing technology and energy markets can fluctuate unpredictably, long term leasing does pose a risk: over time a project may encounter economic, environmental or other problems that were not foreseen at the outset and that make it no longer a wise investment of public or private capital.

The issue is what lease term is best suited for proper capitalization of this investment while avoiding unnecessary risks of locking public property up in a project that is no longer viable or publicly beneficial.

Options:

Under current Maine law, submerged lands leases have a term of up to 30 years, while aquaculture leases are for 10 years. Federal leases for commercial wind power projects are for 30 years. Leases issued by Texas tack on a brief period for construction and testing prior to commencement of a 30 year term for commercial production. Submerged lands leases in other states range widely in duration, as long as 99 years. While not directly entailing leases of public lands, federal regulatory licensing for hydropower projects extends for a term of 30 to 50 years.

Proposal:

While the laws of a few states provide for longer term leases for their submerged lands, 30 years (the term permitted by Maine law) would seem sufficient for wind power facilities. Importantly, this is the duration of commercial offshore wind power and similar leases issued by the federal government and may be only nominally shorter than those issued by Texas, the two jurisdictions with the greatest experience on the subject. Although developers understandably wish to have the longest possible tenure in the property in order to enable the longest payback on investment,[33] the risks of a failing project might argue in favor of shorter term leasing. On balance, based upon what is currently understood a 30 year term (identical to that allowed under the federal leasing program) seems reasonable, and the risks attendant on such a term can be moderated by carefully drafting leases to include sufficient provision for financial security, the next topic for discussion.

5. Financial security

Issue Statement:

Any offshore wind power project will inevitably impose some degree of interference with navigation, fishing, fisheries, recreation and/or other public uses of the area, as well as potential impacts on birds, marine mammals and/or other natural values. Accordingly, when the lease expires or is terminated, or if a project is no longer viable, it should be decommissioned and the affected submerged lands reasonably restored. The State should have assurance that project structures will be removed in an environmentally sound way, an expense that could be considerable. In this regard, the State cannot rely solely upon the developer's lease contract promises, because it may no longer be financially able to perform them years later.

Options:

Under the new federal regulations, financial security for decommissioning and required restoration must be provided usually by a commitment from a legally independent, sufficiently

[33] Of course, this study has not included a market analysis that might be useful in determining optimal lease term issues.

capitalized entity, such as a financial institution. Other states impose similar requirements for significant private development on public lands. Maine's 2009 legislation providing for short term demonstration projects in selected coastal waters contains a provision dealing with this issue, but its requirements may be inadequate in the context of a long term commercial lease.[34] DEP deals with this issue in a number of its regulations, for example in connection with long-term closure and post-closure care for licensed waste facilities.

Proposal:

Using the best of these models, DOC should develop lease terms that deal effectively with issues of long term financial security to assure proper decommissioning of the project, removal of structures and reasonable restoration of the submerged lands.

6. Lease process

Issue Statement:

Maine's aquaculture leasing regulations contain provisions, deemed helpful by a number of those interviewed for this study, by which preliminary meetings and information gathering are undertaken to scope out proposals and obtain feedback before beginning formal application processing and hearings.[35] Probably because it is often accompanied by DEP regulatory permitting, DOC's submerged lands leasing process is more informal and less procedurally inclusive. Can something be gained by incorporating selected aquaculture review procedures into DOC's leasing process when responding to wind power proposals for the State's coastal waters?

Options:

Information gleaned for this study does not suggest that the procedures used by DOC in its submerged lands leasing program are deficient. Accordingly, there is no *need* for a change. However, a number of commenters believe that DMR's procedures described above for identifying concerns prior to formal submission of an aquaculture lease application would be useful in DOC's process for major leases such as for wind power development.

Proposal:

Perhaps in conjunction with DEP in its handling of regulatory permits, DOC should consider employing a pre-application process modeled on that used by DMR for aquaculture leasing. This would provide opportunities for advance identification and mitigation of conflicts with existing and foreseeable uses of the submerged lands involved. Such early interaction among stakeholders can help identify issues, in response to which a prospective lease applicant would have an opportunity to fine-tune its proposal to avoid and minimize conflicts.

[34] P.L. 2009 c. 270; 38 M.R.S.A §480-HH(3)(G)(6).
[35] CMR 13-188 §2.07

V. State Regulatory and Planning Issues

1. Reform of environmental review procedures

Issue Statement:

In 2008, the Legislature enacted reforms of regulatory requirements for major wind power development in upland areas of all municipalities and substantial portions of LURC jurisdiction.[36] For major wind power projects within these areas, the legislation (i) substantially curtailed regulatory consideration of scenic and visual impacts, (ii) waived certain other criteria under Maine's Site Law, (iii) eliminated original jurisdiction of the Board of Environmental Protection, vesting such decision-making exclusively in the Commissioner, (iv) eliminated appellate jurisdiction of the Superior Court to hear challenges of DEP's decisions, allowing judicial appeals to be taken directly to the Law Court, (v) imposed tight timelines for permit decisions, (vi) eliminated LURC rezoning requirements, and (vii) required regulators to consider project benefits. Legislation enacted in 2009 further facilitated demonstration projects in selected coastal waters by limiting DEP regulatory review and substantially curtailing or eliminating LURC, DOC and municipal decision-making roles.[37] Leaving aside specific issues dealing with scenic and visual impact criteria and the LURC law (discussed in sections V(2) and V(4) below), the issue here is whether in general environmental review reforms, comparable to those enacted in 2008 for upland areas, are appropriate to enable commercial wind power development in Maine's coastal waters.

Options:

Approaches range from maintaining the status quo to overhauling regulatory laws applicable to wind power projects in coastal waters in a manner parallel to the 2008 reforms for most upland areas. In considering the latter approach with appropriate caution, it is important to recognize that there are no immediately ready lines of demarcation (such as those adopted for upland areas) differentiating coastal waters where projects ought to be facilitated from those where the State's full complement of regulatory laws ought to apply. Accordingly, for purposes of deciding where best to ease regulatory laws, one might seek to categorize Maine's coastal waters based upon available information concerning wind resources, sensitive natural values and competing human uses.

Proposal:

As a general matter, all who spoke to the issue during interviews and meetings undertaken for this study indicated difficulty rationalizing significantly different regulatory processes for wind power development in inland areas and coastal waters. Even so, it seems inappropriate to apply facilitated regulatory requirements to *all* coastal waters, which in some cases may be highly fragile. Accordingly, the suggestion is to extend regulatory reforms, similar to those enacted in 2008 for inland areas, to wind power development of Maine's coastal waters

[36] P.L. 2007 c. 661
[37] P.L. 2009 c. 270

but only for areas that have been pre-screened under the elementary planning process outlined in section V(5) below.

2. Scenic and visual impact considerations

Issue Statement:

Maine's coastal scenery is rightfully considered one of the State's greatest assets, not just in aesthetic terms but as an economic engine. Offshore of Maine's coast are also its greatest wind energy resources. While visual impacts are not considered by DOC in making submerged lands leasing decisions, such effects are considered under regulatory laws administered by DEP. However, under the 2008 legislation described above, these considerations are significantly curbed for most wind power projects in upland areas. The specific issue here is whether and how the State should consider visual impacts of wind power projects in Maine's coastal waters.

Options:

One policy option is illustrated by the State's aquaculture statute. By law aquaculture projects are evaluated principally according to public trust criteria (impacts on fishing, navigation, wildlife, recreation, other public uses) with limited regard to impacts on visual and similar effects, especially in upland areas.[38] The Legislature could similarly restrict regulatory consideration of visual impacts, particularly those affecting the use of private lands, for wind power projects located in the State's coastal waters. Indeed, the Legislature has done so for demonstration projects in selected waters under the 2009 legislation, as well as projects in upland areas (including in all municipalities) subject to the 2008 legislation. It would be consistent with this approach to confine scenic and aesthetic impact considerations for commercial wind power projects in at least some areas of the State's coastal waters.

An opposing option is based upon the primacy of scenic values of the Maine coast, which under this view should not be compromised by wind power development. Under this option, regulatory burdens *ought* to be high, and scenic and aesthetic criteria tough, with the possible outcome that wind power development would be permitted in few if any areas of the State's coastal waters.

Proposal:

As Maine's and the nation's future increasingly hinges on developing renewable, reliable and inexpensive sources of power that do not contribute to global warming, the State will have to make compromises, including possibly to views seen from coastal shorefront. In this regard, it is important to remember that Maine's coastal waters are public trust resources and should be utilized for the benefit of all of Maine's people. Accordingly, there is merit to the view, imbedded in the State's aquaculture law as well as that regulating wind power development in upland areas, that scenic and aesthetic considerations should generally be confined to those

[38] Under the law, aquaculture leases must not unreasonably interfere with public use or enjoyment within 1000 feet of parks and other conserved public lands. In addition, the lease must comply with specific criteria adopted by DMR relating to color, height, shape and mass of structures as viewed from the water. 12 M.R.S.A. §6072(7-A)

within prescribed distances of public viewsheds of high scenic importance. Otherwise, aesthetic considerations could become serious impediments to what the State believes is the use of its public trust resources best suited to the needs of its people.

3. Site Law applicability

Issue Statement:

Under current law, few if any commercial wind power projects in coastal waters may technically trigger the jurisdictional requirements for DEP Site Law review, even though this is widely acknowledged to be the only State law that has the regulatory scope necessary to properly evaluate projects of this scale. Not written with ocean projects in mind, the Site Law's jurisdictional thresholds typically depend upon the amount of ground that is physically developed or occupied by structures.[39]

In order to fill this void, DEP is considering ways to amend the Site Law to make it clearly applicable to significant projects like wind power that are located in coastal waters. Even if enacted in the next legislative session, such corrective legislation would not be in place until the summer of 2010. In the interim, the Natural Resources Protection Act, though applicable to certain aspects of these projects, will not likely provide sufficient regulatory review to protect the public interest.

Proposal:

Maine's Site Law should be amended so as to clearly apply to substantial wind power and other development projects in the State's coastal waters. In addition to the need for clarifying the Site Law's jurisdictional trigger, DEP has noted that the law's impacts-based standards of approval will need to be revised to ensure their efficacy as applied to offshore wind energy development. Issues regarding noise, for example, will need to be addressed differently for ocean-based as against land-based projects. While awaiting these important amendments, if any commercial wind power projects are proposed in coastal waters, the State should assure that all needed requirements are imposed by DOC under its leasing authority.

4. LURC's Role

Issue Statement:

Currently, decision-making roles affecting development in the State's coastal waters are unnecessarily complicated by questions concerning the extent of LURC's regulatory jurisdiction. Does LURC under its current statute have a regulatory role in coastal waters? If so, precisely what area is encompassed by this jurisdiction? Is it limited to coastal waters offshore of unorganized areas and plantations (which define LURC's upland jurisdiction) and, if so, to precisely what geographic extent? Although the agency has never pursued these points (largely

[39] In pertinent part, Site Law review and permitting are required for developments that occupy an area of more than 20 acres or involve structures occupying more than 3 acres of ground. 38 M.R.S.A. §482(2) and (6). These measures do not correspond well to even extensive wind power facilities located in coastal waters.

because there has never been much reason to), there is even some question whether LURC's jurisdiction arguably extends to *all* of the State's coastal waters.

Beyond these legal issues, as a matter of policy one should consider whether coastal waters *should* be within LURC's regulatory jurisdiction for purposes of offshore wind power development. Even if so, there is a further policy issue whether wind power development should require rezoning of such waters (as it currently does).

Note that under the 2009 legislation, whatever role may otherwise be played by LURC has been eliminated for purposes of wind energy demonstration projects in selected coastal waters.[40] Finally, one must bear in mind that, from a policy perspective, the issue of LURC's role may be substantially inseparable from that of municipalities described in section VI below.

Options:

The current uncertainty of LURC's role spawns unnecessary issues that ought to be resolved before commercial wind power projects are proposed for the State's coastal waters. The following measures could be pursued to provide needed certainty and predictability as to LURC's involvement.

As options to consider, the law may be clarified to precisely delineate the geographic scope of LURC jurisdiction in coastal waters, either by (i) confining it to specific areas around upland portions of its jurisdiction, (ii) clearly extending it throughout the State's coastal waters, or (iii) entirely excluding coastal waters from LURC jurisdiction at least for purposes of projects subject to DEP regulatory jurisdiction. As an alternative to a regulatory role, LURC could exercise whatever planning function it wishes to undertake for coastal waters around islands and upland in its jurisdiction, with regulatory and leasing agencies to consider a plan if adopted by LURC. Again, the resolution of this policy issue is linked to that affecting municipal jurisdictions, as described in section VI below.

Proposal:

Uncertainties under the current law concerning the extent of LURC jurisdiction over these projects should be resolved. For wind power projects in State coastal waters, LURC's role, paralleling that recommended for municipalities described later, should be in an advisory but non-regulatory capacity. While such an advisory role may include whatever planning LURC may wish to undertake for areas in proximity to islands and other upland areas in its jurisdiction, DEP should have exclusive regulatory control over these projects in coastal waters.

5. The role of planning

Issue Statement:

In anticipation of offshore alternative energy projects, Rhode Island, Massachusetts and New Jersey are undertaking extensive efforts at resource analysis and integrated management

[40] P.L. 2009 c. 270

planning to assess the best locations for such development as well as areas that should be avoided due to overriding user and natural resource conflicts. Massachusetts intends to use its resource inventory work to create a zoning-like process to select sites for wind power development in its coastal waters. While most or all of the areas studied and likely to be developed offshore of Rhode Island and New Jersey are within federal waters, these states intend to use their plans to substantially influence the federal leasing process. For projects in both state and federal waters, federal regulatory permits, such as from the Army Corps, will be necessary, and these too can be influenced by state planning efforts.

By contrast, although it has the most experience in wind power development, Texas is representative of many states in being reactive to proposals for such uses of its coastal waters rather than undertaking a planning effort to deal proactively with them. With extensive involvement over many years in leasing these waters for oil and gas drilling, Texas is accustomed to the types of issues they pose and appears to have few regulatory or other concerns with them. Although far more engaged than Texas in the regulatory process, the federal government has not yet undertaken a significant planning effort for wind power development in federal waters due to the vastness of this jurisdiction (generally extending from three to 200 miles offshore of the entire U.S. coast). However, the Obama administration has indicated that it may establish a framework for ocean planning; if Maine does not fully engage in this effort, opportunities to advance critical state energy and other natural resources-related interests may be lost.

In short, the issue is whether Maine should (like Massachusetts) adopt a comprehensive planning and zoning framework, or (like Texas) remain reactive to such proposals as may materialize, or find a middle ground combining a measure of planning with practicality.

Options:

Clearly, there are significant advantages to undertaking a comprehensive planning process like that of Massachusetts or Rhode Island. This would result in a coherent system for government decision-making, whereby all permitting, leasing and other state and local decisions must be consistent with the adopted plan, as is the case in Massachusetts. Such a planning effort would also enhance Maine's influence on federal decisions affecting waters beyond the State's territorial limits.

However, given the extent and complexity of Maine's coast as well as of its potentially conflicting use and resource needs, a Massachusetts- or Rhode Island-style comprehensive plan may be an unrealistic undertaking for Maine in the immediate future. As a result, it might seem practical right now for Maine to adopt a posture, like Texas, of remaining largely reactive to proposals rather than trying to comprehensively plan for them.

Even so, under its 2009 legislation, Maine has embarked on a modest planning process to select areas for demonstration wind power projects in its coastal waters, with these projects to receive facilitated regulatory treatment.[41] A similarly elementary but, with adequate funding,

[41] id

feasible planning process could be extended to all of the State's and nearby federal coastal waters.

Proposal:

For right now, a truly comprehensive planning process may be out of reach for Maine because of cost, feasibility and timing issues. However, if adequate funding can be found, an elementary (but vital and expeditious) planning study should be undertaken using currently available information concerning significant wind resources, fisheries, fishing, navigation, recreation, significant public scenic vantage points, bird and marine animal migration routes, and accessible onshore transmission capacity. This undertaking will require the State to work in cooperation with the University of Maine and the federal government to find the resources and mount the necessary effort. As described in sections V(4) and VI, this planning work might also include a role for municipalities and LURC in areas neighboring their upland jurisdictions. Starting with an evaluation of areas considered for demonstration projects under the 2009 legislation, such a study could be extended coast-wide and cover both State and nearby federal waters.

At minimum, this planning effort would provide useful guidance to both developers and state and federal leasing and regulatory agencies. A Maine plan could also be integrated into any federal plan that might be forthcoming in the future. Such a plan would furnish the basis for identifying areas within Maine's coastal waters where facilitated regulatory permitting would be appropriate under the proposal described in V(1) above.

6. Coordination with the federal government

Issue statement:

Since Maine's ownership of submerged lands extends to only three miles offshore of its coast (including islands), many opportunities for wind power development in which the State has a vital interest may occur in federally controlled waters. Even though in such areas Maine would not have direct leasing and regulatory jurisdiction, federal law provides considerable comity for coastal states that wish to influence federal decision-making. Under the Coastal Zone Management Act,[42] Maine and other states that have a federally approved coastal zone management program may review federal actions for determination of their consistency with the program's "enforceable policies."

Federal agency actions, such as issuance of a submerged lands lease for a wind power project, must be consistent "to the maximum extent practicable" with applicable state enforceable policies. The CZMA also provides means to ensure that federal license or permit decisions are consistent with pertinent enforceable policies in the state's program. Acting through the State Planning Office, Maine may concur or object to a federal agency's or permit applicant's assertion of consistency with state natural resources and environmental laws (including the Site Law and NRPA) which provide the program's enforceable policies. Accordingly, state

[42] 16 U.S.C. §1451, *et seq.*

concurrence or objection is typically based upon a DEP order making findings and conclusions under these license and permit authorities.

The issue is whether Maine should amend or supplement its federally approved program, embracing the changes proposed here, to assure their consideration in making consistency determinations under the CZMA regarding proposed wind power projects in federal waters. A second issue is whether the State is as fully coordinated as possible with federal permitting agencies.

Options:

Maine may seek to amend its federally approved coastal zone program to include pertinent legal and programmatic amendments to deal with wind power development in federal waters offshore of its coast. Alternatively, Maine could still provide comments on specific federal projects without pursuing formal consistency review.

Some coastal states report a disinclination to seek to amend their authorized CZM programs for purposes of applying new state regulatory programs to wind power projects in federal waters. This view appears to be motivated by concern that the federal government might be unwilling to approve these amendments or that seeking federal approval will impose unacceptable administrative burdens.

Meanwhile, a number of avenues may be pursued for better coordination of state and federal permitting, which is especially important for wind power projects that extend into coastal waters controlled by both levels of government.

Proposal:

In order to maintain as much control as possible over development in federal waters that may affect its interests, Maine should seek to amend its federally approved CZM program to include all pertinent state statutes, rules and other program changes that address offshore wind power projects, including the amendments described herein. While seeking federal approval to these changes will result in some administrative costs and may not be completely successful, failing to do seems like an opportunity lost and may later impede the State's ability to influence federal agency decision-making on projects in federal waters where Maine has a keen interest.

Finally, state and federal permitting agencies should explore opportunities to coordinate and harmonize permit review procedures and related information requirements in ways that reduce development costs while ensuring focused and appropriately detailed consideration of potential adverse effects. State-federal coordination on wetlands permitting pursuant to the Army Corps' Maine Programmatic General Permit could provide a useful model.

VI. The Role of Municipalities

Issue Statement:

Perhaps no other issue described here gives rise to so much potential for uncertainty as the role of municipalities affecting wind power projects in Maine's coastal waters. In the past, with no significant development proposed offshore of Maine's coast, there has been little reason to delve into the complex issue of the jurisdictional reach offshore of each of Maine's 130 coastal municipalities. However, depending on what may be historically haphazard and imprecise language in their state charters, some municipalities might assert regulatory and/or taxing jurisdiction over these projects.

There is significant merit to the argument that State decisions about utilization of the submerged lands that it holds as a public trust for all of Maine's citizens should not be impaired by municipal regulation or even outright prohibition. Presumably for this reason, municipalities do not exercise regulatory authority over aquaculture activities authorized by State-issued leases. Municipal authority has also been curtailed in the 2009 legislation that provides for a facilitated path for wind power demonstration projects in selected areas of the State's coastal waters.[43]

Very few states allow any role for municipalities to exercise regulatory control over development authorized within state submerged lands. While Massachusetts continues to enable municipalities to have a regulatory role, their decisions must be consistent with the state's Ocean Management Plan, now nearing completion, which will establish locations for wind power projects in coastal waters.

Options:

With a history of municipal home rule authority, Maine will experience some degree of conflict over whether to divest municipalities of whatever role they might arguably have under their various charters with respect to regulating and taxing offshore wind power projects. Accordingly, one may choose to leave the issue as it stands, allowing the municipal role to play itself out in ad hoc negotiations with prospective developers and in legal contests determining the extent of each affected municipality's jurisdiction.

Alternatively, one may recognize that the current scattershot approach could result in hobbling projects that the State wishes to pursue as trustee of its submerged lands and coastal waters. The State could take a proactive approach, balancing fairness to municipalities that may be affected by an offshore project with the need for greater certainty for prospective wind power developers and the public concerning utilization of these State resources. This option might involve taking an approach similar to that for aquaculture projects by conferring a formal consultative role upon municipalities in connection with state leasing and/or regulatory decision-making; or it might allow municipalities to exercise any regulatory controls over wind power facilities within coastal waters provided that such authority is not utilized in a manner that frustrates State objectives. In any event, municipal comprehensive plans that deal with issues affecting nearby coastal waters could be considered by state regulatory and leasing agencies.

[43] P.L. 2009 c. 270, 38 M.R.S.A. §480-HH(14).

In lieu of the current possibility of local property taxation of such facilities in coastal waters where municipalities might assert taxing jurisdiction, the law could allow all nearby municipalities to receive a share of the revenues or other compensation paid to the State leasing agency. The Legislature could develop a formula for revenue sharing dependent on proximity of a municipality's upland to the project. Although the input parameters would be different, this approach could be comparable to the current federal revenue sharing scheme where nearby states automatically receive a portion of lease income from wind power projects in federal waters.[44]

Proposal:

In order to create a predictable process consistent with State objectives for wind power development in Maine's coastal waters, municipalities should be afforded a formal consultative role, but not direct regulatory control, concerning projects subject to State regulatory and/or leasing decisions. This disposition would mirror the role that municipalities currently play in State decision-making affecting aquaculture leasing. In both cases, the municipal role, while important, should be appropriately subordinated to the State's trust oversight of resources that belong to all of Maine's people.

The State should also consider adopting a formula for lease revenue sharing with municipalities whose upland jurisdiction lies within a prescribed distance of the project, drawing as appropriate from the approach taken by the federal government in sharing income with nearby states from projects in federal waters. A fair formula for revenue sharing would replace the scattershot approach that currently exists for possible assertion of municipal taxing authority over these projects lying in the State's coastal waters.

[44] Under recently adopted federal regulations, states located within 3 miles of wind power projects in federal waters automatically receive 27% of revenues collected by the federal government. There is a formula for equitable distribution of this share among states lying within 15 miles of the geographic center of a project.

VII. Next Steps

The number and complexity of issues described here might seem daunting. However, each issue presents an opportunity; just by considering them, Maine is on the path to their resolution. For each issue, there are abundant, viable options to be considered, including the ones outlined above. As stated at the beginning, the proposals offered here are not advanced as 'the answers' but rather as illustrations to stimulate thinking among policy makers.

The Ocean Energy Task Force is in an ideal position to evaluate these and other issues, options and responses. This study represents one person's independent input into that process.

Looking ahead, if they are to be addressed, several issues will call for legislation, while others may be treated through agency rulemaking or policy development. Consistent with the proposals outlined above, the following represents one approach:

1. Leasing issues:

- Provide for maximum coordination between DOC and DEP, including by requiring lease decisions to incorporate pertinent DEP fact-finding (legislation and/or rulemaking).

- Make use of Public Advocate's Office and/or other relevant state agencies in setting and negotiating lease terms (rulemaking and/or agency policy).

- Establish lease application fees, rent and compensation formulae (legislation, rulemaking and agency policy).

- Establish competitive bidding and other lease review process modifications (legislation and/or rulemaking).

- Determine and prioritize how rent proceeds will be expended (legislation, rulemaking and agency policy).

- Provide for wind power as a use of submerged lands consistent with the public trust doctrine (legislation).

- Provide for wind power as a water-dependent use (rulemaking).

- Provide for financial security and other terms geared to wind power leases (rulemaking and/or agency policy).

2. Regulatory issues.

- Reform environmental review procedures for wind power leases in certain coastal waters based upon planning input (legislation, rulemaking and agency policy).

- Provide a coherent approach to dealing with scenic issues (legislation, rulemaking and agency policy).

- Amend jurisdictional triggers and substantive requirements under the Site Law (legislation and rulemaking).

- Clarify LURC jurisdiction in the State's coastal waters (legislation and/or rulemaking).

- Provide for feasible and timely planning, leading to better guidance for wind power developers and state agencies and more efficient and predictable outcomes of regulatory processes. (legislation, rulemaking and agency policy).

- Seek appropriate amendments to Maine's Coastal Zone Management program (agency policy).

- Coordinate and harmonize state and federal regulatory permitting, particularly for projects spanning both jurisdictions (rulemaking and/or agency policy).

3. Municipal issues.

- Clarify municipal regulatory and taxing jurisdiction (legislation).

- Provide for municipal revenue sharing (legislation).

Appendix of Sources

SPO Wind Power Study

prepared by Jeff Pidot

Statutes and Regulations

Federal

Sec. 388 of the Energy Policy Act of 2005, Public Law 109-58

Final Rule, Minerals Management Service, U.S. Dept. of Interior, Renewable Energy and Alternative Uses of Existing Facilities on the Outer Continental Shelf, 30 CFR Parts 250, 285 and 290, April 2009

Dept. of Interior Regulations Notice, Summary, FAQs and Comments on OCS Regulations for Alternative Energy and Alternate Uses, April 22, 2009

Maine

P.L. 2009, c. 270, An Act To Facilitate Testing and Demonstration of Renewable Ocean Energy Technology

P.L. 2009, c. 316, An Act To Amend Provisions of the Submerged Lands Law

P.L. 2007, c. 661, An Act to Implement Recommendations of the Governor's Task Force on Wind Power Development

State Submerged Lands Law, 12 M.R.S.A. §1861 et seq.

State Aquaculture Leasing Law, 12 M.R.S.A. §6071-A et seq.

LD 1322, An Act to Amend Revisions of the Submerged Lands Law (DOC bill)

LD 1912, Compensation for Use of State Waters and Islands draft

LD 1465, An Act to Facilitate Testing and Demonstration of Renewable Energy Technology (Ocean Energy Task Force bill, enacted)

Submerged Lands Rules, CMR 04-059, c. 53

Aquaculture Lease Regulations, CMR 13-188, c. 2

Other States

California Public Lands Leasing Regulations. http://www.slc.ca.gov/Regulations/Article_2.html

Delaware Regulations Governing the Use of Subaqueous Lands, Code of Delaware Regulations Title 7, sec. 7504. http://regulations.delaware.gov/AdminCode/title7/7000/7500/7504.shtml

Florida Submerged Lands Management Rules, Florida Administrative Code 18-21. https://www.flrules.org/gateway/ChapterHome.asp?Chapter=18-21

Louisiana Statute on Water Bottom Leasing for Wind Power. LRS 41:1731 et seq. http://www.legis.state.la.us/lss/lss.asp?doc=321305

Massachusetts Rules Concerning Licenses for Use of Waterways. 310 CMR 9.00

New Jersey Tidelands Act. N.J.S.A. 12-3. http://www.state.nj.us/dep/landuse/12_3.pdf

New Jersey Coastal Zone Management Rules. N.J.A.C. 7:7E. http://www.nj.gov/dep/rules/rules/njac7_7e.pdf

New York Tidal Wetlands Rules. Code of NYS Regulations Part 661. http://www.dec.ny.gov/regs/13337.html

North Carolina State Property Regulations. Code of NC Regulations 01-06. http://reports.oah.state.nc.us/ncac.asp?folderName=\Title%2001%20-%20Administration\Chapter%2006%20-%20State%20Property%20and%20Construction

Oregon Rules Governing the Placement of Ocean Energy Conversion Devices On, In or Over State-Owned Land Within the Territorial Sea. 141-140-0010

Oregon Submerged Lands Leasing Rules. http://arcweb.sos.state.or.us/rules/OARS_100/OAR_141/141_082.html

Rhode Island Coastal Resources Management Program, as amended (the 'Red Book'). http://www.crmc.ri.gov/regulations/RICRMP.pdf

Texas coastal wind lease form and instructions.

Texas regulations on oil and gas leasing. Texas Admin. Code Title 31, Part 1, ch. 9. http://info.sos.state.tx.us/pls/pub/readtac$ext.ViewTAC?tac_view=4&ti=31&pt=1&ch=9

Virginia statute on submerged lands leasing. § 28.2-1200.1. http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+TOC28020000012000000000000

Washington State laws on land use rentals for water dependent uses. http://apps.leg.wa.gov/WAC/default.aspx?cite=332-30-123

Washington State aquatic land management regulations.
http://apps.leg.wa.gov/WAC/default.aspx?cite=332-30

[see web sites for additional materials]

Cases

Center for Biological Diversity v. FPL Group, 166 Cal.App. 1349 (2008)

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Reports and Articles

Federal

Alternative Energy Programmatic EIS, October 2007

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[see web sites listed below for additional materials]

Web Sites

American Wind Energy Association: http://www.awea.org

Buzzards Bay National Estuary Program: http://www.buzzardsbay.org/windfarms.htm

Maine Ocean Energy Task Force: http://www.maine.gov/spo/specialprojects/OETF

Maine Wind Energy Map:
http://www.windpoweringamerica.gov/ne_astate_template.asp?stateab=me#map

Maine Wind Power Task Force: http://www.maine.gov/doc/mfs/windpower/index.shtml

Marine Conservation Agreements: A Practitioner's Toolkit:
http://www.leaseown.org/State_Summaries/State_Summaries_intro.html

New Jersey Tidelands Leasing Program: http://www.nj.gov/dep/landuse/tideland.html

Offshore Wind Energy Information: http://offshorewind.net

Rhode Island Ocean SAMP: http://seagrant.gso.uri.edu/oceansamp/

Texas Energy Office Wind Energy. http://www.seco.cpa.state.tx.us/re_wind.htm

Texas Land Office News and Information. Texas Awards First Competitive Wind Leases in the United States.
http://www.glo.state.tx.us/news/archive/2007/events/windlease_100207.html

Texas Mineral Leasing on State Lands Information Site:
http://www.glo.state.tx.us/energy/leasesales/index.html#OffshoreData

U.S. Dept. of Energy, Maine Wind Activities:
http://www.windpoweringamerica.gov/ne_astate_template.asp?stateab=me

U.S. Dept. of Interior, Mineral Management Service, Renewable Energy Program:
http://www.mms.gov/offshore/RenewableEnergy/index.htm

U.S. Dept. of Interior, Mineral Management Service, OCS Alternative Energy and Alternate Use Information Center: http://ocsenergy.anl.gov/index.cfm

Washington State Energy Siting Council: http://www.efsec.wa.gov

Washington State Submerged Lands Program:
http://www.dnr.wa.gov/BusinessPermits/Topics/ShellfishAquaticLeasing/Pages/aqr_aquatic_land_leasing.aspx

Interviews, Meetings, Communications

Todd Burrowes (SPO) – 287-1496	5/4, 5/27, 6/11/09, other dates
Dan Prichard (BPL, DOC) - 287-4919	5/7/09
Beth Nagusky (DEP, OETF) - 287-5869	5/7/09
Andy Fisk (DEP) - 592-0327	5/14/09
Diantha Robinson (DMR) – 633-9531	5/19/09
Eric Bryant (Public Advocate) 287-2445	5/20/09
Tom Federle (attorney for developer)	5/22/09
John Kerry (OEIS, OETF) - 287-6250	5/26/09
Faith Huntington (PUC)	5/27/09
John Weber (Massachusetts)	5/29/09
Laura Herr (Delaware)	6/1/09
Terry Howie (Louisiana)	6/3/09
James Cassida (DEP Land)	6/3/09
Tammy Brooks (Texas)	6/8/09
Dwain Rogers (Texas)	6/9/09
Grover Fugate (Rhode Island)	6/11/09
Kevin Hassell (New Jersey)	6/17/09
Don Perkins (OETF)	6/18/09

Meeting with agency staff:
Dan Prichard (DOC), Jim Cassida (DEP), Samantha Horn-Olsen (LURC), Marcia Spencer-Famous (LURC), Steve Timpano (IFW), Stephen Dickson (MGS), Joe Zamboni (Governor's Office), Todd Burrowes (SPO). 6/19/09

Meeting with members of advisory group:
Kathleen Leyden (SPO), Karin Tilberg (Gov. Office), Jack Cashman (PUC), David Littell (DEP), George Lapointe (DMR), Beth Nagusky (DEP, OETF), Will Harris (DOC), Bob Marvinney (MGS), Joe Zamboni (Gov. Office), John Kerry (OEIS), Jennifer Puser (OEIS), Dick Davies (OPA), Todd Burrowes (SPO). 7/1/09

Meeting with Kathleen Leyden and Todd Burrowes 7/8/09

Email communications with Chris Potter (CA), Paul Klarin (OR), Jennifer Hennessey (WA), Jeremy Firestone (DE) and Nicholas Lund (Maine Law School student)